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ABSTRACT

Although libel has remained the major legal problem of the press for 40 years, little empirical research has been conducted concerning its impact. Various methods for conducting this type of needed research include traditional legal research, surveys of practitioners, and surveys of persons outside the media who are directly affected by mass media, such as attorneys, judges, and elected officials. Problems with such surveys include self-interest and low response rate. A more direct method for analyzing the impact of media law is to measure the quantity and quality of specific legal activities in state and federal courts. An example of such a study is the Avery and Steven analysis of libel appeals in the states of Ohio, Michigan, Kentucky, and Tennessee during the ten years before the Gertz libel decision and the ten years after. In addition, there are various techniques for evaluating the outcomes of media laws by using unobtrusive measures and documentary evidence. Public opinion is important in studying media law as an ongoing process. Having hard data about the impact of media law should be preferable to remaining unaware of its implications. (DF)

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IMPACT ANALYSIS OF THE LAW CONCERNING FREEDOM OF EXPRESSION

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IMPACT ANALYSIS OF THE LAW CONCERNING FREEDOM OF EXPRESSION

by F. Dennis Hale

In February of 1972 the magazine of the Society of Professional Journalists, Quill, published the article, "The Law of Libel Has Been All But Repealed."[1] What a difference a decade makes. The November 1980 issue of the journalism trade magazine, Presstime, featured the article, "Libel: Old Nemesis Haunts Press; Suits Multiply, Rulings Sting."[2] By the middle of the 1980s virtually every national periodical devoted to mass communications, politics or law had published a major article on the subject of libel. Typical was the May 1985 issue of Columbia Journalism Review which included a 13-page cover article by Michael Massing, "The Libel Chill: How Cold Is It Out There?"[3]

Massing's article demonstrates the need for empirical research that measures the impact of the law of freedom of expression. After interviewing 150 reporters, editors and media attorneys, Massing "came away convinced that a chill has indeed set in," meaning the press was censoring itself and avoiding controversial stories because of a fear of libel suits. However, Massing also reported that hard evidence of a chilling effect was difficult to find and that anecdotal evidence of the impact of libel was mixed. For example, he found that two indicators of aggressive reporting have remained stable: the number of investigative stories submitted for Pulitzer Prizes and the number of libel suits brought against the press.[4]

Although libel has remained the major legal problem of the press for 40 years, little empirical research has been conducted concerning its impact. There also is a lack of empirical research that measures the impact of journalism law concerning source confidentiality, open meetings, open records, privacy, and television in the courtroom. This paper will consider research methodologies for conducting this type of needed research.

Traditional legal research examines the impact of a legal doctrine by analyzing subsequent court actions with similar fact situations. Sometimes the impact is quite clear. Trager and Stonecipher examined lower court decisions on gag orders for the two years after the Supreme Court's 1975 decision which created major barriers to such orders. The authors found no examples of press gag orders that were upheld by appellate courts.[5] More typically, traditional legal research comes up with mixed results. In an analysis of the landmark libel decision Gertz, Helle reported that different groups had viewed the decision as a setback and a victory for the press. He observed: "Subsequent developments at the Supreme Court level seem to have proven both groups correct."[6]

Political scientists, aware of the limitations of tradional legal research, for over 20 years have conducted research variously called impact analysis, compliance behavior and effect analysis. Wasby noted that this approach began shortly after the school desegregation case of 1954 when social scientists realized that compliance with the Supreme Court "was neither automatic, immediate nor uniform."[7] In 1970 Levine divided impact analysis into four categories based upon the causal distance of the outcome measured from the agent of change.[8] The first category was specific implementation--compliance by parties to the case with the Supreme Court order. The second category was hierarchical control of the judiciary--whether Supreme Court doctrines are followed by lower courts. Third was political impact--the response of those government officials given new legal obligations by a Supreme Court decision. And fourth were social consequences, what Levine termed the most important of all the categories: How is the fabric of society changed? What dislocations of social or economic life ensue? Levine decried the almost complete lack of this kind of research that measured the net result of a Supreme Court decision.

Levine argued that decision-makers such as Supreme Court justices need such impact analysis to constantly correct and modify behavior to achieve goals more efficiently: "A major theme running through modern jurisprudence since Holmes is that judges should look forward to the consequences of decisio instead of backwards toward axiomatic first principles."[9]

On at least three occasions the Supreme Court has commented on the status of research measuring the impact of First Amendment law. In Branzburg, when the Court refused to create a testimonial privilege for journalists, Justice White wrote that "Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."[10] He also noted that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public."[11] Nine years later, when the Court ruled that cameras in courtrooms did not deprive a defendant of a fair trial, Chief Justice Burger wrote: "At present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that (judicial) process."[12] Burger left the door ajar for a later re-examination of the question, cautioning that his conclusions were based on "the data now available." He added: "Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, ipso facto interferes with trial proceedings."[13] Lastly, in 1982, in a decision invalidating a state statute that required courtrooms to be

closed during the testimony of juvenile victims of sexual crimes, Justice Brennan commented: "The commonwealth has offered no empirical support for the claim that the rule of automatic closure...will lead to an increase in the number of minor sex crime victims coming forward and cooperating with the authorities."[14]

Impact analysis is not limited to the doctrines created by the U.S. Supreme Court. Such analysis is equally useful for assessing the impact of any law or regulation that influences expression and society. Included are the decisions of other federal courts and state appellate courts, policies of regulatory agencies such as the Federal Communications Commission and the Federal Trade Commission, federal and state statutory law, and even county and city regulations that impinge on free expression. State government has considerable authority over libel, privacy, source confidentiality, obscenity, and open meetings and records. This provides the opportunity for the analysis of the impact of contrasting state policies. Supreme Court Justice Brandeis commented on this condition in 1932: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."[15] Analysis of the impact of such state experiments as prohibitions against punitive damages in libel and shield laws preventing the naming of confidential sources can provide state and federal judges with clues about the consequences and costs and benefits of various policy options.

Surveys of Media Practitioners

One method for measuring the impact of journalism law is to survey the people who are affected most directly, the mass communications practitioners. One of the earliest and most comprehensive such studies was Blasi's survey of 975 reporters and editors who worked for daily newspapers, underground papers, network news, news magazines and local broadcast news.[16] Blasi found that government reporters relied on confidential sources twice as often as sports reporters, and that 79 percent of reporters relied on confidential sources for 25 percent or fewer of their stories. A major finding was that only 8 percent of the journalists indicated that their coverage during the last 18 months had been adversely affected by the possibility of a subpoena.

Although the Supreme Court cited the Blasi study in Branzburg, it was unpersuaded by it. Justice White dismissed the findings with the observation that "Surveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in the light of the professional self-interest of the interviewees."[17] This is one of the shortcomings of surveys that examine the reported attitudes and behaviors of media professionals. When Buss and Malaney asked news personnel at 251 television stations what they thought of government control of political and campaign reporting of networks, not surprisingly 78 percent said there was too much government control.[18] Everyone--not just journalists--resents government interference with an occupation or profession.

Surveys of media professionls are most illuminating when they go beyond affective measures of whether something is liked or disliked and examine reported behavior. Three studies

(Anderson and Murdock,[19] Bow and Silver,[20] Driod[21]) measured the reaction of journalists to the Supreme Court's decision, Herbert v. Lando. The Court ruled that the actual malice rule in libel did not protect the press from having to testify about the editorial process, including newsroom conversations and subjective opinions about sources. The press subjected the decision to unprecedented and harsh criticism. In a speech Justice Brennan, who dissented in Herbert, chided the press for its intemperance: "The injury done the press was simply not of the magnitude to justify the resulting firestorm of acrimonious criticism."[22]

Although the sampling methods of the three studies differed, their results were similar. In all three surveys, about four of five journalists objected to the Herbert decision. And in all three studies, journalists had difficulty citing specific effects of the decision. Some 84 percent of the 67 journalists in Driod's sample said they had not been affected in any way by Herbert. Some 83 percent of the newspaper managing editors in the Anderson and Murdock study said that Herbert had not made publishers less aggressive. And 90 percent of the over 300 broadcast and newspaper executives in the Bow and Silver study said Herbert had little or no effect, and 88 percent said their attorneys had not issued new guidelines as a result of the decision. Despite their obvious self-interest and strong dislike for the Herbert doctrine, journalists were willing to concede that the decision had not affected them.

The specific provision of the law is not the only restraint of journalists. This was underscored in a survey of publishers and reporters on Guild newspapers. Reporters were significantly

more supportive of provisions of a model contract concerning confidential sources.[23] The study demonstrated that a qualified legal right is not very useful to a journalist if the publisher-employer will not agree to support the reporter in e[illegible]ising the right. The attitudes of media owners are relev[illegible] this question of impact of First Amendment decisions.

Surveys of Policy Implementers and Interpreters

The other logical group to survey about the impact of journalism law consists of persons outside of the mass media who are directly affected by mass media law--media attorneys, public attorneys, judges, elected officials and government administrators. Prosecuting attorneys have attracted considerable attention from researchers. Gerald surveyed county prosecutors about the impact of the Supreme Court's Sheppard decision and the 1969 Reardon Report concerning prejudicial publicity.[24] Devol questioned prosecuting and defense attorneys in California about the impact of the 1966 pandering, obscenity decision of the Supreme Court.[25] And Leventhal surveyed city, county and U.S. prosecutors about the impact of the Miller decision.[26]

Other surveys of policy implementers and interpreters are: Hale questioned media attorneys about the impact of libel decisions and closed criminal hearings and trials.[27] Cushman and Froke surveyed Illinois judges about the presence of broadcast equipment in courtrooms.[28] Eberhard and Wood also surveyed judges in one state, as well as attorneys and journalists, about fair trial-free press issues.[29] Trager and Dickerson surveyed high school principals, newspaper advisors and student editors about prior restraint and the influence of a decision of the U.S. Court of Appeals.[30] And Horine surveyed

members of city councils and school boards about compliance with the California open meeting law.[31]

One problem with such surveys is self-interest. Government officials are not likely to admit that they have violated the law or have failed to enforce the law. Nor surprisingly, 90 percent of Horine's city council and school board members said that their executive sessions never or rarely violated the state open meeting law.[32] And in Gerald's study, prosecuting attorneys, who are major contributors to the problem of prejudicial publicity, reported that prejudicial news had been sharply curtailed after the Sheppard decision.[33]

The low response rate of the subjects was another problem: 35 percent of the school board and city council members,[34] 38 percent of the high school advisors and 35 percent of the editors,[35] 38 percent of Illinois judges,[36] and 41 percent of prosecutors.[37] Such low response rates create problems concerning the reliability and generalizability of the findings of the surveys. This is not, however, an unsolvable problem. Eberhard and Wood convinced 57 percent of the Georgia judges and 55 percent of the district attorneys to cooperate with their survey.[38]

To measure the impact of the law, you must start with a clear-cut legal doctrine. This was lacking in two of these studies. Trager and Dickerson examined the impact of a three-judge decision of the Seventh Circuit of the U.S. Court of Appeals on public high schools in the three states of the circuit. The 1972 Fujishima decision invalidated a Chicago School District requirement that high school students obtain permission from an administrator prior to the distribution of off-campus materials

in the schools.[39] Fujishima was only a three-judge decision (in fact, one of the judges on the appellate panel was only a federal trail judge); it was not an en banc decision of all 12 members of the Seventh Circuit. And the decision was contrary to similar decisions in other circuits. One has to question the premise behind the study that the decision was a mandate to school administrators in the three states. Fujishima specifically concerned prior restraint of the distribution of off-campus materials. The study in part questioned high school personnel about prior restraint of official school publications produced for academic credit.[40] This is quite a different legal question than the one presented in Fujishima.

Similarly, there was an unclear legal mandate in Devol's analysis of the 1966 pandering, obscenity decision. Devol questioned prosecuting attorneys about the number of obscenity arrests and convictions before and after Ginzburg v. United States.[41] The attorneys cited Ginzburg as a cause of both more and fewer prosecutions. There is a question of whether the Supreme Court in 1966 gave the government substantial new power to prosecute for obscenity. Ginzburg allowed a work to be judged on how it was promoted, a consideration that is absent in most obscenity cases. And on the same day that the Court decided Ginzburg, in another case it gave the green light to the book, "Memoirs of a Woman of Pleasure," which a dissenting Justice Clark characterized as "nothing more than a series of minutely and vividly described sexual episodes."[42] In 1966 the Supreme Court was continuing to give sexually explicit material considerable constitutional protection. The law was unchanged.

The Court's obscenity doctrine did not change until 1973 when five members of the Court in Miller rejected the notion that a work had to be utterly without redeeming social value and substituted the requirement that a work lack serious literary, artistic, political or scientific value.[43] Miller armed state and federal prosecutors with greater authority to control obscenity. Leventhal ingeniously measured the impact of the 1973 Miller decision by surveying city, county and federal prosecutors about the number of obscenity cases in the two two-year periods, 1971-72 and 1974-75. The public attorneys reported that although obscene material continued to become more available after Miller, that the number of obscenity convictions declined and the likelihood of obtaining a conviction remained unchanged.[44]

Measures of Litigation Levels

A more direct method for analyzing the impact of media law is to measure the quantity and quality of specific legal activities in state and federal courts. Precise measurement of appellate court activity is possible because of the existence of the National Reporter System and American Digest System which report, analyze and classify virtually every decision of a federal or state appellate court.

An example of such a study is the Avery and Stevens analysis of libel appeals in the four states of Michigan, Ohio, Kentucky and Tennessee during the ten years before the Gertz libel decision and the ten years after. The researchers found 20 cases for 1964-74 and 58 for 1974-83: "While one cannot discount the rapid growth of litigation in all fields, this is an extraordinary increase."[45] They also found an

increase in the use of summary judgments from 30 percent in the earlier period to 64 percent. One conclusion was that Gertz "was indeed a seminal opinion, one that left its mark."[46]

Using a similar approach for a nationwide study, Stevens analyzed the 148 appeals of criminal libel suits for the 50 years, 1916-65. He discovered that very few of the criminal libel suits amounted to seditious libel in which a government official used the criminal law to punish the press for criticism of government. Only 31 of the criminal libel suits during 50 years concerned criticism of government officials, and only 9 of those were directed at newspapers.[47]

Two researchers have utilized new publications that specialize in media law to measure activities at both the trial and appellate court level. Franklin used Media Law Reporter to examine 101 libel trials and 190 libel appeals for the four years, 1977-80. Media Law Reporter, produced weekly by the Bureau of National Affairs, published decisions of most federal and state, trial and appellate courts that concern media law. Franklin found that media defendants were winning libel suits 75 percent of the time at both the trial and appeals level, and that elected officials were winning 18 percent of the time versus 6 percent for all plaintiffs.[48]

Mehra used Media Law Reporter and The News Media & The Law to examine 129 subpoena cases involving journalists for the four years, 1977-80. News Media is published every other month by the Reporters Committee for Freedom of the Press. It publishes news stories about media law cases, not verbatim court decisions. Mehra found that journalists were forced to testify in 58 percent of criminal cases, versus 33 percent of civil cases in which the reporter was not a party. And the press won 86

percent of the time when it appealed a subpoena.[49]

In libel, where large damage awards are at stake and a high percentage of trial court judgments are appealed, appellate activity is an accurate mirror of trial activity. However, this may not be true in such areas as subpoenas and closed judicial proceedings. It requires more resources than most academic researchers have to monitor such activities at the pre- and trial-court level of the judiciary.

Two organizations, the Reporters Committee and the Libel Defense Resource Center, have conducted studies of media law activity at the trial-court level. The Reporters Committee, assisted by the Associated Press and the American Newspaper Publishers Association and eight other organizations, monitored the nation's courts for closed criminal proceedings during the two years after the Supreme Court's Gannett decision which permitted the closure of pretrial hearings when there was a danger that publicity would prejudice jurors. The study found that courts were closed 60 percent of the 400 times that closure was requested, and that grounds for one-third of the requests were factors not mentioned in Gannett.[50] Robert Becker, an assistant director for the Reporters Committee, said the project on closed judicial proceedings was discontinued in part because of the realization that a lot of closures were unreported and the project was presenting an incomplete picture.[51]

The Libel Defense Resource Center for five years has monitored libel cases at the trial and appellate levels and issued reports. The LDRC has found that media defendants fare much better in front of judges than juries, and that public figures and officials win about two-thirds of the time when a libel case goes to trial.[52]

Unobtrusive and Documentary Measures

What transpires within the judicial system is only the tip of the iceburg that represents the impact of media law. Levine insisted that the final outcomes and social consequences "are the broadest and most diffuse of all effects, but in the final analysis, the most important."[53] Levine said that to investigate outcomes and consequences, "imaginative and daring methods of data collection must be used even if they are crude and unsystematic."[54] This section examines various techniques for evaluating the final outcomes of media laws by using unobtrusive measures and documentary evidence.

What is the end result of the mandated balance in broadcast news and such requirements as the Fairness Doctrine, Personal Attack Rule and Equal Time Provision? Two systematic studies of FCC documents concluded that the impact of such laws has been minimal. Weiss analyzed the 64 reports for the 1970s in which radio or television licenses were revoked and found only 12 percent related to personal attacks, fairness or news slanting. He concluded: "reflecting the FCC's wariness of entering this area, the (programming related) offenses were usually part of a longer litany of charges against the licensee."[55] Chamberlin examined the requirement that broadcasters devote a reasonable amount of time to public affairs, a provision of the Fairness Doctrine that the FCC has called one of the most important of all responsibilities of broadcasters. He examined 75 programming reports that major television stations filed with the FCC. He found that the stations devoted only 5 percent of their programming between 6 A.M. and midnight to public affairs, and over half of this

came from the networks and concerned national and not local issues.[56]

An example of a nonacademic study of the final outcome of a media law was a 1978 project of 30 Maine newspapers. Newspaper editors visited police stations in their circulation area and asked to see complete records of the most recent arrests. Fewer than half of the stations would provide the records in compliance with the state's 19-year-old open records law. Subsequently, the state attorney general sent guidelines that mandaded open records to the state's police chiefs. A second check of 111 police stations found 92 percent in compliance with the open records law.[57] Direct observation or interaction is a valuable research tool.

A major study for the Federal Trade Commission measured the impact of advertising by attorneys on the price of legal services. In 1977 in the Bates decision the Supreme Court ruled that the First Amendment granted attorneys the right to truthfully advertise routine legal services.[58] The states reacted unevenly to the Supreme Court doctrine and many barriers to attorney adversing remained. The FTC study of attorneys in 17 major cities examined the impact of individual attorney advertising and state codes on attorney advertising on the price of basic legal services such as uncontested divorces and simple wills. One conclusion was: "For each of the five legal services studied, lower prices were found in cities where the fewest restrictions on advertising existed."[59]

In a study of the outcome of a quasi-legal restraint on the press, Tankard analyzed pretrial crime stories in newspapers in states with and without bench-bar-press guidelines.

In 23 states, attorneys, judges and journalists drafted voluntary guidelines to discourage the reporting of prejudicial information about criminal defendants such as confessions and prior criminal records. Tankard's sample of 167 stories came from 16 papers in states with guidelines and 13 papers in states without guidelines. The study found a mean of 1.1 violation of guidelines per story, with no statistically significant difference between states with and without guidelines. The study concluded that the "guidelines enjoy less than universal approval among editors."[60]

News stories have been used in another way to measure the consequences of media laws. Researchers have measured the quality and quantity of press coverage of First Amendment decisions of the Supreme Court an an indicator of their importance. Katsn measured the three television networks' coverage of U.S. Supreme Court decisions for a five-year period and discovered that 20 percent of decisions were covered. However, 100 percent of abortion decisions were covered and 50 percent of free press or religion decisions were covered.[61] Hale compared newspaper coverage of 20 free press and 20 free speech decisions of the Supreme Court. The ten newspapers in his sample devoted a mean of three times more column inches to a press than a speech decision, and editorialized three times as often about a press than a speech decision.[62]

Hale and Katsn also used the citation of court decisions in judicial and legal materials as measures of legal significance. Katsn classified as legally significant those Supreme Court

decisions that subsequently were discussed in the summer summary issue of U.S. Law Week or the fall summary issue of the Harvard Law Review. Hale's measure of legal significance was the number of states in what a court had cited a media law decision. The legal research service, Shepard's Citations, indicates every instance in which a court decision is cited by a state or federal appellate court, law journal or legal report service.

The rationale for this use of legal citations is that court decisions that make a significant long-range impact on public policy are the ones most likely to be contested and to generate litigation, and thus are the decisions most likely to be cited by appellate courts and legal scholars. Thus Silverman observed: "The sheer quantity of appallate court opinions on specific issues therefore has significance."[63] And Mott noted that "the extent to which the decisions of a court are followed is...evidence of its influence on the general development of the law in the United States."[64]

Hale's study of newspaper coverage of the California Supreme Court measured six kinds of citations: the state's own supreme court, the state's own intermediate appeals court, federal courts, other state appellate courts, the state's own law journals, out-of-state law journals. The study measured the number of the six kinds of citations that a court decision received during the three years after it was filed. The three-year time period was used because it was discovered that the number of annual citations hit a peak the second year and fell off after that.[65]

One other unobtrusive measure of the outcome of media law is insurance, particularly libel insurance. The number of

subscribers has increased during the last ten years. And after a lengthy period of stability, the cost of insurance doubled in 1984 and doubled again in 1985.[66] Data of the three largest libel insurers could provide clues about the impact of Supreme Court libel decisions. Such data also would indicate the number and cost of out-of-court and pretrial settlements, important matters that are not accurately reflected in appellate court decisions on libel. Just how much money are newspaper, magazine and broadcast executives spending on legal fees to answer questions about editorial copy? To what extent are attorneys consulted before and after publication? And what specific areas of media law received the most attention? These kinds of questions could be answered with access to privileged records of insurance companies that provide libel insurance, and the budgets of media newsrooms.

Public Opinion

Public opinion is important in studying media law as an ongoing, dynamic process. Public opinion is at the same time a final outcome of existing law and a cause of future change in that law. The link between public opinion and law is quite weak and indirect in the case of constitutional law. The impact of public opinion on Supreme Court doctrines obviously is delayed and diluted. However, it is possible for public opinion to directly influence constitutional law through constitutional amendments.

It is more likely that public opinion will influence the formation of media law that is not constitution-based and that is created by popularly elected representatives in government. Public opinion could influence obscenity, broadcasting, access

to federal records, police searches of newsrooms, confidentiality of sources, and even libel and privacy--all areas over which the U.S. Congress has or could have jurisdiction. Public opinion also could influence areas of media law affected by popularly elected state legislators or state appellate judges such as libel, privacy, confidentiality of sources, obscenity, cameras in the courtroom and access to government meetings and records.

Additionally, public opinion could influence the implementation or enforcement of laws concerning libel, obscenity and open meetings, in which the public sits on juries. One reason for the difficulty in obscenity convictions is that the public generally supports the right of adults to examine sexually explicit materials.

Researchers have only scratched the surface in their study of public opinion and freedom of expression. Public support for reporter confidentiality has grown until a strong majority favors the protection.[67] And in California, voters made a press shield law a part of the state constitution by a vote of about 3 to 1.[68] Just what is the source of this public support? Does the public perceive this as a matter of privacy for reporters? More research is needed.

To what extent are public opinions about the press in general--trust in the press, personal experiences with the press, etc.--related to public support of media laws? More research also is needed in this area.

A number of surveys have reached similar conclusions concerning fairness of the news media. The public has

difficulty discerning the difference between a moral obligation or ethical responsibility to be fair and balanced, and a legal mandate to be fair. The public supports the Fairness Doctrine, and supports it equally for both the print and the broadcast media.[69] This could have implications for the development of the law in this area.

Conclusions

This discussion of how to measure the impact of the law concerning freedom of expression was intended to cover both freedom of press and freedom of speech. However, few studies of speech were found and so the analysis dealt primarily with the impact of mass media law. Thus one conclusion is that studies of the impact of First Amendment law should more often look at the broader concept of freedom of expression which includes freedom of press and freedom of speech and freedom to receive information. The most important First Amendment decision of the last decade may not have concerned libel, gag orders, cameras in courtrooms or fair trials; it may have been the Supreme Court decision on the Minnesota case that permitted pamphleting to be controlled in a place as public as a state fair.[70]

The most frequently used research method for measuring the impact of media law was surveys of media practitioners and policy implementers. This methodology could be refined through the use of more direct approaches that measure behavior. Such survey research might be combined with content analysis of the appropriate news media. Another productive approach might be to enlist subjects to keep diaries for a week or a month of specific activities related to media law.

A methodology that has been explored less frequently is measuring the level of court litigation. Data about appellate court activity is readily available; however, data about pre-trial and trial-court activity is difficult and expensive to obtain. Records of editors and broadcasters and libel insurance companies could provide data about this important level of activity. In areas such as subpoenas, closed courtrooms and invasion of privacy, most of the action--and expenditure of attorney fees--may occur during the pre-trial phase of litigation.

The real challenge to researchers, however, is to measure the end results--or outcomes or consequences--of media laws. Researchers must attempt to quantify, specify and operationalize such concepts as chilling effect and right to know. We need to determine precisely what stories of public interest were killed because of a new libel doctrine. And what stories were killed that would have unnecessarily libeled a person?

One ingenious approach was Tankard's measure of prejudicial publicity in states with and without voluntary bench-bar-press guidelines. The study found that guidelines were violated once per story in both kinds of states. These findings contradicted Gerald's survey of prosecuting attorneys. This demonstrates the advantage of using unobtrusive measurements of policy outcomes.[71]

These various approaches to research about the mass media may prove unpopular with persons within the journalism profession who prefer to argue for an absolute or preferred position for press rights and who do not see rights as entities that can be balanced or that can be weighed with a cost-benefit analysis.

An impact analysis may determine that the impact of a media law is minimal, or that the cost of the impact to the press is outweighed by the benefit to society as a whole. Such findings will not be popular with journalists or press associations. Having hard data about the impact of media law should be preferable to the situation "in the cloistered chambers of the Supreme Court where the justices often stumble blindly and haphazardly in quest of working rules of law that accomplish desired ends."[72]

Footnotes

[1]Frederic C. Coonradt, "The Law of Libel Has Been All But Repealed," The Quill, 60:16-19 (February 1972).

[2]C. David Rambo, "Libel: Old Nemesis Haunts Press: Suits Multiply, Rulings Sting," Presstime, 2:4-7 (November 1980).

[3]Michael Massing, "The Libel Chill: How Cold Is It Out There?" Columbia Journalism Review, 24:31-43 (May/June 1985).

[4]Ibid., pp. 32-33.

[5]Robert Trager and Harry W. Stonecipher, "Gag Orders: An Unresolved Dilemma," Journalism Quarterly, 55:231-240 (Summer 1978).

[6]Steven Helle, "Judging Public Interest in Libel," Journalism Quarterly, 61:117-124 (Spring 1984).

[7]Stephen L. Wasby, "The Supreme Court's Impact: Some Problems of Conceptualization and Measurement," Law and Society Review, 5:43 (August 1970).

[8]James P. Levine, "Methodological Concerns in Studying Supreme Court Efficacy," Law and Society Review, 4:583-611 (May 1970).

[9]Ibid., p. 607.

[10]Branzburg v. Hayes, 408 U.S. 665, 1 Med.L.Rptr. 2617, 2628 (1972).

[11]Ibid.

[12]Chandler v. Florida, 449 U.S. 560, 7 Med.L.Rptr. 1041, 1049 (1981).

[13]Ibid., p. 1048.

[14]Globe Newspaper v. Superior Court, 102 S.Ct. 2613, 8 Med.L.Rptr. 1689, 1695 (1982).

[15]New State Ice Co. v. Liebmann, 385 U.S. 262, 311 (1932).

[16]Vince Blasi, "The Newsman's Privilege: An Empirical Study," Michigan Law Review, 70:229-284 (1971-72).

[17]Branzburg, supra note 10 at 2628.

[18]Terry F. Buss and Gary D. Malaney, "How Broadcasters Feel About the Fairness Doctrine," Journalism Quarterly, 55:793-797 (Winter 1979).

[19]Douglas A. Anderson and Marianne Murdock, "Effects of Communication Law Decisions on Daily Newspaper Editors," Journalism Quarterly, 58:525-528 (Winter 1981).

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